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84-1908

IN THE

Supreme Court of the United States

October Term, 1984

ONEIDA INDIAN NATION OF WISCONSIN,

Petitioner,

v.

HOUDENOSAUNEE and
ONEIDA OF THE THAMES BAND COUNCIL,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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62 pp

Question Presented for Review.

Whether an order disqualifying counsel in a civil case on grounds of conflict of interest is an interlocutory, non-appealable order.

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984.

ONEIDA INDIAN NATION OF WISCONSIN,

Petitioner,

v.

HOUDENOSAUNEE and
ONEIDA OF THE THAMES BAND COUNCIL,

Respondents.

Petition for Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit

Opinion Below.

The opinion of the court of appeals is reported at 757 F.2d 19 (2nd Cir. 1985).

Jurisdiction.

The court of appeals' order was entered on March 5, 1985, and petitioner's timely petition for rehearing was denied on April 11, 1985. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

Statute Involved.

28 U.S.C. §1291

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction

of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

Statement of the Case.

This is an appeal of an interlocutory order disqualifying counsel on grounds of conflict of interest. The underlying civil cause is an Indian land claim within the district court's jurisdiction under 28 U.S.C. §1331 and §1362. The cause was filed in 1979 with three tribal plaintiffs - the Oneida Indian Nation of Wisconsin, the Oneida of the Thames Band, and the Oneida Indian Nation of New York - making a joint claim to ownership of aboriginal lands in upstate New York. The nature of the underlying litigation is set forth in Oneida Indian Nation of New York v. New York,

691 F.2d 1070 (2nd Cir. 1982).

Shortly after the underlying suit was filed, a fourth Indian claimant - the Six Nations Confederacy or the Houdenosaunee - moved for and was ultimately granted intervention to assert a separate claim to the subject property independent of and on different grounds than those of the original Indian claimants. The intervening Indian claimant was at that time and has since been represented by the Indian Law Resource Center.

In the meantime, the Oneida of the Thames Band, one of the original plaintiffs, dismissed its counsel, amended its complaint to allege the Confederacy claim along with its own claim, and retained the Indian Law Resource Center to represent it in the litigation. All

other parties in the litigation joined in a motion to disqualify the Indian Law Resource Center from representing the Thames Band on grounds of conflict of interest. The district court granted the motion and the Thames Band appealed.

On appeal to the Second Circuit, the parties disputed the court of appeals' jurisdiction. The Oneida Indian Nation of Wisconsin advised the court of the pendency of Koller v. Richardson - Merrill, Inc., No. 84-127, cert. granted 53 U.S.L.W. 3284 (October 15, 1984), where the issue of courts of appeals' jurisdiction over disqualification orders in civil cases will be decided. Without reference to the Koller case, the Second Circuit held that it had jurisdiction over the appeal and determined that the Indian Law Resource Center could repre-

sent both the Confederacy and the Thames Band so long as both clients demonstrated their consent on the record. The Second Circuit denied a timely petition for rehearing.

Reason for Granting the Writ.

IN EXERCISING ITS JURISDICTION OVER AN ORDER DISQUALIFYING COUNSEL IN A CIVIL CASE, THE COURT OF APPEALS FAILED TO DEMONSTRATE DUE REGARD FOR THIS COURT'S CURRENT DELIBERATIONS ON APPELLATE JURISDICTION OVER SUCH ORDERS.

At the time the notice of appeal herein to the Second Circuit was filed, this Court had pending before it an application for certiorari to the Eighth Circuit for review of Koller By and Through Koller v. Richardson - Merrill, Inc., 737 F.2d 1038 (8th Cir. 1984). The Eighth Circuit had decided that an

order in a civil case disqualifying counsel was immediately appealable and the petition for certiorari sought review of that issue, inter alia. As stated in the Koller petition, the jurisdictional question presented for review is, "Is order disqualifying counsel in civil case subject to interlocutory appeal in light of Flanagan v. United States, 52 L.W. 4201 (1984)?" 53 U.S. L.W. 3272. On October 9, 1984, this Court granted certiorari in the Koller case. Koller v. Richardson - Merrill, Inc., No. 84-127, 53 U.S.L.W. 3272.

Because the Koller case would determine the court of appeals' jurisdiction to proceed here, the Oneida Indian Nation of Wisconsin moved to stay this appeal pending the outcome in Koller. The motion was denied. In its brief on the

merits, the Oneida Indian Nation of Wisconsin contested the court of appeals' jurisdiction and urged that the court await the decision in Koller before deciding the issue. The Second Circuit later issued its opinion here, finding that disqualification orders in civil cases are immediately appealable, and remanded the issue back to the district court for further proceeding. In its petition for rehearing, the Oneida Indian Nation of Wisconsin urged reconsideration of the jurisdictional issue and suggested that, at a minimum, the court of appeals should hold issuance of its mandate until Koller, which had been argued some three weeks before, is decided. The petition for rehearing was denied.

At every juncture in the appeal,

petitioner Oneida Indian Nation of Wisconsin raised the Koller case and urged restraint until the court of appeals' jurisdiction was settled. At every juncture the court of appeals rejected petitioner's arguments without reference to the Koller case. The further proceeding on the disqualification issue mandated by the court of appeals is now scheduled in the district court for May 21, 1985.

The Second Circuit Court of Appeals is, of course, a court of limited jurisdiction. If it acts without jurisdiction, its order therein is a nullity. See Donovan v. Richland County Assn., 454 U.S. 389, 390 (1982); Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 379 (1981). Considerations of judicial economy and the integrity of judicial

proceedings, then, counsel that the court of appeals proceed cautiously where a substantial question exists as to its jurisdiction. Particularly where the jurisdictional issue has been committed to this Court for resolution, hasty action by the court of appeals is unseemly.

With no reference to the Koller case or discussion of considerations favoring restraint, the Second Circuit proceeded to issue its opinion and mandate in this appeal. The court's disregard of this Court's deliberations on the jurisdictional issue justifies review by certiorari or, in the alternative, holding the petition until Koller is decided by this Court. See, e.g., Keney v. New York, 388 U.S. 440 (1967).

Respectfully submitted,

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APPENDIX A--Decision of the District Court, Dated June 26, 1984

79-CV-798

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

ONEIDA INDIAN NATION OF WISCONSIN, ET. AL,

Plaintiffs,

-v-

THE STATE OF NEW YORK, ET AL.,

Defendants.

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NEAL P. McCURN, D.J.

MEMORANDUM-DECISION AND ORDER

The court has before it three motions by plaintiff Oneida of the Thames Band, each of which pertains to prior rulings of this court which must now be reconsidered in light of recent Court of Appeals decisions concerning the disqualification of the Thames Band's counsel, 732 F.2d 259 (2d Cir. Mar. 14, 1984); the production of documents, id.; and intervention by the Houdenosaunee, or Six Nations Iroquois Confederacy, and certain of its constituent nations. 732 F.2d 261 (2d Cir. Apr. 15, 1984), petition for rehearing denied, ___F.2d___(2d Cir. May 29, 1984).

Specifically, the Thames Band has moved (1) to vacate the court's Order, entered April 25, 1984, striking its first amended complaint, or in the al-

ternative, to grant it leave to file the first amended complaint; (2) to vacate this court's Order, dated July 31, 1983, disqualifying the Indian Law Resource Center from representing the Oneida of the Thames Band; and (3) for an order directing former counsel for the Thames Band to deliver to it all files and documents relating to her former representation.

I.

A thorough review of the background of these matters if far too herculean a task for present purposes; the following summary of pertinent rulings issued since the initial remand of this case in October of 1982, see Oneida Indian Nation of New York v. State of New York, 691 F.2d 1070, will suffice to place these motions in context.

In a Memorandum-Decision dated August 1, 1983, this court disqualified attorney Robert T. Coulter of the Indian Law Resource Center from representing plaintiff Oneida of the Thames Band on the ground of adversity of interest between the Thames Band and attorney Coulter's other client, the Houdenosaunee, which was then planning to intervene as a plaintiff in this case. The court also, in that decicision, denied without prejudice the Thames Band's motion to compel its former counsel, Arlinda Locklear, to deliver materials generated during the period that she had jointly represented the Thames Band and the Oneida Indian Nation of Wisconson.

The Houdenosaunee and some of its constituent nations subsequently moved to intervene, which motion was denied by

this court in a decision entered October 11, 1983, __ F. Supp. __.

The Court of Appeals, reviewing the disqualification/material production rulings of August 1, found it significant that the Thames Band had subsequently sought to amend its complaint, and therefore remanded both issues to this court for reconsideration, "because of the distinct possibility that the amended complaint, if allowed, will moot the entire controversy" by eliminating the adversity between the positions of the Thames Band and the Houdenosaunee. 732 F.2d at 261 (2d Cir. March 14, 1984).

However, in a ruling from the bench on March 27, this court granted defendants' motion to strike the Thames Band's amended complaint, primarily on the grounds that the Thames Band was

neither the "real party in interest," Fed. R. Civ. P. 17, nor had standing to assert the claims of Houdenosaunee title to the subject lands that were added by the amended complaint. Order entered April 25, 1984.

On April 5, the Court of Appeals reversed this court's denial of the Houdenosaunee's motion to intervene, and held that it was entitled to intervene as of right. 732 F.2d 261 (2d Cir. Apr. 5, 1984) petition for rehearing denied, _ F.2d __, (2d Cir. May 29, 1984).

Shortly thereafter, the court conducted a prehearing conference, which resulted in an Order directing, inter alia that the parties prepare for an evidentiary hearing on the remanded motion to dismiss, which hearing would commence on September 12, 1984 in Syra-

cuse, New York. Supplementary Prehearing Order, dated May 8, 1984. The Order also provided a schedule for the filing of motions that required resolution prior to the evidentiary hearing. Id. ¶16. The instant motions are among those.

II.

The Thames Band's first motion is to vacate the court's Order, entered April 25, 1984, striking its first amended complaint, or in the alternative, to grant it leave to file the first amended complaint. In support of its motion, the Thames Band stresses that, at the time of the prior ruling, the court's major concern was that the amended complaint would add new issues not otherwise in the case; but that the Second Circuit's decision permitting the

Houdenosaunee to intervene and introduce those new issues now removes that rationale.

Clearly, the prospect of introducing new complex issues into the lawsuit was a major -- though perhaps not the major -- factor in initially striking the amended complaint. As the court observed from the bench after discussing the real party-in-interest and standing issues; the amended complaint "would circumvent the court's previous decision denying the Houdenosaunee motion to intervene," by introducing into the action "new and extensive area of disputed law and fact [that promise] to render this suit intolerably complex and possibly interminable." Transcript at 9. The Thames Band is certainly correct in contending that the Houdenosaunee intervention re-

moves that rationale.

It is more questionable, however, whether the Houdenosaunee intervention also removes the problems perceived with respect to the Thames Band's interest in and standing to assert the new allegations in its amended complaint. See Transcript 3-9. But while the court's concerns persist, they now appear overshadowed by the Houdenosaunee intervention. Both Rule 17 and the standing doctrine are designed to insure sufficient interest and adversity for an authoritative judicial resolution of a dispute. The Houdenosaunee intervention undeniably supplies that interest and adversity. There seems to no longer be any substantial justification for restraining the Thames Band from aligning in the manner it sees fit.

The 12 county defendants advance three arguments in opposition to the filing of the amended complaint, none of which the court finds persuasive. First, they point out that the amended complaint would assert two contradictory theories: (1) that the Thames Band's interest derives from its status as a successor to the Oneida Indian Nation, which owned the subject land; (2) that the Thames Band's interest derives from its status as a constituent nation of the Houdenosaunee, which owned the subject land. These defendants contend that the Thames Band "cannot have it both ways."

Rule 9(e) Fed. R. Civ. P. expressly permits a party to plead "two or more statements of a claim or defense alternately," and to "state as many separate claims or defenses as he has regardless

of consistency." There is therefore nothing improper about the contradiction between the two theories asserted by the amended complaint.

Second, the 12 counties argue that the Thames Band is barred from asserting any right under the Houdenosaunee title by the doctrine of "judicial estoppel" which, as stated in Scarano v. Central R. Co. of New Jersey, 203 F.2d 510 (3d Cir. 1953) provides that

> A plaintiff who has obtained relief from an adversary by asserting and offering proof to support one position may not be heard later in the same court to contradict himself in an effort to establish against the same adversary a second claim inconsistent with his earlier contention. Such use of inconsistent positions would most flagrantly exemplify that playing 'fast and loose with the courts' which has been emphasized as an evil the courts will not tolerate.

See also, Roth v. McAlister Bros. Inc., 316 F.2d 143 (2d Cir. 1983).

According to the 12 counties, the Thames Band has run afoul of the doctrine of judicial estoppel because, in another tribal land claim in this district, Oneida Indian Nation of New York v. County of Oneida, 70-CV-35 (Port, D.J.) the Thames Band prevailed on its claim that the subject land was reserved for the Oneida Indian Nation at the time of the challenged 1788 conveyance to the State of New York, see 434 F. Supp. 533, and that such conveyance is the same transaction that is the principal subject matter in this case. The judgment for the plaintiffs in County of Oneida will be reviewed by the Supreme Court next term. 104 S. Ct. 1590; 52 U.S.L.W. 3678 (March 20, 1984). As the 12 counties argue:

> So long as the Oneida of the Thames Band insists upon maintaining a position before the Supreme Court of the United States which is predicated upon ownership of the land in question resting in the Oneida Nation as opposed to the Houdenosaunee, any effort by it here to assert a contradictory position is clearly an affront to judicial dignity.

Opposition of 12 Counties at 5.

In the court's view, the contradiction between the Thames Band's claim in County of Oneida and their alternate claim here does not present the type of egregious claim switching that warrants invoking the judicial estoppel doctrine. That doctrine is more appropriately invoked in circumstances where a litigant would reap a double benefit from switching claims. In Scarano, supra, for instance, an employee suing for reinstatement was equitably estopped from contending that he was physically able to work

since he had previously alleged in an FELA action against the same employer that he was unable to work, and had obtained a substantial judgment for the loss of future earning potential. The instant case, however, is not one in which the Thames Band, having succeeded on one theory, is now attempting to reap a double benefit by asserting its antithesis. Instead, the Thames Band is simply asserting the same theory it had previously asserted, plus an alternate theory. This is not, in the court's estimation, a "cynical abuse" of the liberal federal pleading rules. See 5 Wright & Miller, Federal Practice & Procedure §1283 at 377-78 (1969 ed.).

Finally, the 12 counties argue that the amended complaint must be rejected because it will necessitate renotifying

the defendant class, which the Thames Band has indicated it is unwilling to do.

This concern is not a persuasive basis for rejecting the filing of the amended complaint. Certainly, the court has discretion to prescribe appropriate notice to the class, which was certified pursuant to Rule 23(b)(1)(B). 85 F.R.D. 701, 706 (N.D.N.Y. 1980). The need for additional notice is a matter that has been deferred until after the forthcoming evidentiary hearing. Supplementary Prehearing Order ¶(7). The defendants' anticipation that the Thames Band will fail to comply with a future order of the court with respect to notice does not, however, reflect upon the propriety of the underlying amendment of their pleading.

Accordingly, the court will grant

the Thames Band leave to file its amended complaint, though defendants' need to answer the new allegations will be stayed, as set forth in the decretal paragraph, post.

III.

The Thames Band has also moved to vacate this court's Order of July 31, 1983, which disqualified Robert T. Coulter of the Indian Law Resource Center as its attorney on the ground of adversity of interest between the Thames Band and the Houdenosaunee, also represented by Coulter. At that time, the Thames Band was proceeding on the basis of a complaint in which it claimed an interest in the subject land that derived from the ownership interest of the original Oneida Indian Nation of New York; the Houdenosaunee, by contrast,

was seeking to intervene to assert the claim that the subject land has always belonged to it and was never the separate property of the Oneidas apart from the Six Nation Confederacy. In view of the pleadings, the court found joint representation by one counsel to be unacceptable, since "vigorous representation of either client would inevitably be at the expense of the other." Memorandum Decision and Order at 4.

As noted previously, that Order was reviewed and remanded by the Court of Appeals, which explained:

> . . . the Thames Oneida, represented by new counsel, at least on an interim basis, have submitted to the District Court an amended complaint, which they allege eliminates the claimed adversity between the positions of the Thames Oneida and the Houdenosaunee. Whether the District Court will grant leave to amend the complaint remains to be determined.
>
> . . . .

> Because of the distinct possibility that the amended complaint, if allowed, will moot the entire controversy as to whether attorney Coulter may represent the Thames Oneida . . . we conclude that the appropriate disposition of this appeal is a remand . . . . 723 F.2d at 260-61.

This court has now decided to permit the filing of the amended complaint proposed by the Thames Band. [1] Section

---

[1] The amended complaint would add a new cause of action pursuant to 42 U.S.C. §1983. In its decision permitting the Houdenosaunee to intervene, the Court of Appeals instructed that:

> Unless otherwise authorized by the district court, intervention should not enlarge the bounds of the land sought to be recovered. Nor need the intervenors be allowed to encumber the litigation with their proposed claims for waste, for violation of 42 U.S.C. §1983, and breach of fiduciary duty, not pleaded by the Oneidas. 732 F.2d at 263 n.2.

Although the parties have not addressed this issue, it is arguable that these instructions would apply will equal force to the addition of such claims by

II, ante. A review of that pleading, however, reveals that while the Thames Band has added a claim that it has in common with the Houdenosaunee, it has not eliminated its claim that is adverse to the claim of the Houdenosaunee. Compare Amended Complaint ¶5 with ¶6. Hence, the Thames Band now claims, in substance, that (1) its interest derives from the Houdenosaunee ownership of the subject land; but that if it is determined that the Houdenosaunee did not own the land, then (2) its interest derives from the Oneida ownership of the subject land. As the Oneidas of Wisconsin argue, in opposition to the instant motion:

(footnote 1 continued) amended complaint. The court defers resolution of this question until after the evidentiary hearing, so that it may be addressed along with any similar motion directed toward the complaint-in-intervention.

> It will be difficult at best for independent counsel to adequately represent [the Thames Band's] interest on two conflicting claims. It will be impossible for counsel representing the [Houdenosaunee], which opposes one of those two claims, to represent the Thames Band on both those claims. Memorandum of Oneida Indian Nation at 3.

A hypothetical posed to counsel for the Thames Band during oral argument on this motion illustrates the conflict that a joint counsel could encounter, given the current pleadings. Counsel was asked, in words or substance:

> Assume, hypothetically, that at the trial level the Houdenosaunee claim is dismissed, and the Oneida plaintiffs prevail on the theory that they have an interest in the land as successors to the Oneida Indian Nation, which was the original owner. Wouldn't a joint counsel for the Thames Band and the Houdenosaunee be in a position of both prosecuting and opposing an appeal of that decision.

In response, counsel indicated that, inasmuch as the Thames Band now considers

itself aligned in interest with the Houdenosaunee, it would probably permit its counsel to pursue an appeal on behalf of the Houdenosaunee, even though such appeal would place its recovery on the theory of Oneida ownership at risk. He also opined that, if the Thames Band decided to protect its recovery from the jeopardy posed by a Houdenosaunee appeal, it could at that juncture retain independent counsel.

Rather than reassuring the court that any conflict of interest under such circumstances would be insignificant, this colloquy confirmed the court's view that joint representation is unacceptable. Although the Thames Band certainly could, if it so chose, pursue a potential recovry through the Houdenosaunee rather than defend an adjuciated recovery through the

Oneidas, independent advice on such matters would be crucial. As this court stated in its order of July 31, 1983:

> The issue here . . . is not whether the Oneida of the Thames Band may realign with the Houdenosaunee; rather, it is whether an attorney with other loyalties may preside over the realignment. Memorandum-Decision and Order at 5.

The Thames Band also argues that there is no necessary inconsistency between its claim of an interest through the Houdenosaunee and its alternative claim of an interest derived from the Oneida Indian Nation; it maintains that "the two claims can be reconciled since the claim of the Houdenosaunee includes the interest of the Oneida Nation." Memorandum of Thames Band at 5. The argument is completely unpersuasive. First, it assumes the very issue in dispute; i.e., that the Oneidas' interest

in the land arises only by virtue of its membership in the Six Nation Iroquois Confederacy. If that is, in fact, the "alternative claim" that the Thames Band is asserting, there is nothing "alternative" about it; it is indistinguishable from its claim through the Houdenosaunee.

However, it is quite clear, as counsel for the Thames Band acknowledged at oral argument, that there <u>is</u> a fundamental distinction for the Thames Band between a recovery through the Oneidas, and a recovery through the Houdenosaunee. The difference touches many aspects of this case, from the proof that would be required to establish these respective claims, to the manner in which a recovery would be distributed.

Indeed, the Court of Appeals recognized as much in its decision permitting

the Houdenosaunee to intervene as of right. In response to an argument by those opposing intervention that the interests of the Houdenosaunee would be adequately represented by the existing plaintiffs, at least in part, the Court countered:

> Moreover, we do not agree that the existing plaintiffs represent adequately the interests of the proposed intervenors, even as to the first aspect of the intervenors' complaint . . . . In this case, the intervenors and the existing plaintiffs are conflicting claimants to the same land. This alone precludes representation of the intervenors' interests by the plaintiffs. 732 F.2d at 266 (emphasis added).

As stated at the outset of this discussion, the Thames Band has, in its amended complaint, added a claim that is in complete harmony with the claim of the Houdenosaunee; but it has not elim-

inated its prior claim of an interest derived from the Oneida Indian Nation. Thus the Thames Band and the Houdenosaunee are still, on the basis of their pleadings, conflicting claimants to the same lands. Under such circumstances, the court cannot permit joint representation of both parties by one counsel, without jeopardizing the integrity of the final judgment in this case.

The Thames Band's motion to vacate that portion of this court's Order of July 31, 1983, which disqualified Robert T. Coulter from representing the Thames Band is therefore denied.

IV.

In its third and final motion, the Thames Band seeks an order directing its former counsel, Arlinda Locklear, to deliver to it all files and documents

relating to her former representation. The movant contends that Locklear is under an absolute duty, under principles of professional responsibility, to return all material relating to her former client that was generated during the period that she had jointly represented the Thames Band and the Oneida Indian Nation of Wisconsin; that she is not permitted, now that that joint representation has ended, to favor the interests of her current client, the Oneida Indian Nation of Wisconsin, over those of her former client, the Thames Band. In opposition to the motion, the Oneida Indian Nation of Wisconsin acknowledges a continuing duty of its counsel to her former client but contends that, due to the joint representation of the Thames Band and the

Houdenosaunee -- or rather, efforts to proceed through joint representation -- attorney Locklear cannot turn over material to the Thames Band's counsel without violating the confidences, and prejudicing the case of her current client since material would then be available for use by the Houdenosaunee in its adverse claim to the subject land.

Since the initial argument on this motion, the court has been informed that the majority of the materials in question have been turned over by Locklear to the counsel for the Thames Band, and that efforts have been made, albeit unsuccessfully so far, to arrange for the production of the remainder of the materials. Nevertheless, a dispute on this issue persists, and requires a ruling.

At oral argument on this motion, attorney Locklear indicated that in the event attorney Coulter became permanently disqualified from representing the Thames Band in this action, she would agree to produce the materials in question for the Thames Band. Since this court has, for the reasons set forth in section III, ante, disqualified attorney Coulter from representing the Thames Band in this action, it will direct attorney Locklear to produce the materials in question to the Thames Band's independent counsel without engaging in any analysis of the competing professional responsibility principles at stake.

At oral argument, the possibility was raised that the Thames Band might appeal, and conceivably obtain a reversal of the disqualification order, in

which case the Wisconsin Oneidas' concerns about confidential material being prematurely revealed to the Houdenosaunee would be realized.

Although the court indicated at oral argument that it would stay any production order until any appeal of the disqualification order is resolved, in light of the fact that the date of the evidentiary hearing is rapidly approaching, and in light of the fact that the Houdenosaunee will, at some near date, likely be able to obtain this same material through discovery, the court will modify the oral indication of what its ruling would be in the following respect: attorney Locklear will be directed to turn the material in question over to the current, independent counsel for the Thames Band; such counsel will be direct-

ed to refrain from disclosing such materials to counsel for the Houdenosaunee until such time as the Houdenosaunee properly obtains the material through discovery or until further order of this court. This ruling should promote the twin objectives of enabling the Thames Band to utilize the material in its preparation for the forthcoming evidentiary hearing and protecting the Wisconsin Oneidas from premature disclosure of the materials to the Houdenosaunee.

It is, therefore,

ORDERED, that

(1) The Thames Band is granted leave to file its first amended complaint (without prejudice to defendants' right to move, after the evidentiary hearing, to strike the claim for violation of 42

U.S.C. §1983. Amended Complaint ¶71). Defendants' currently pending motions to dismiss shall be deemed directed toward the amended complaint insofar as applicable, and defendants' time to answer or move with respect to the new allegations in the amended complaint is stayed until after the evidentiary hearing is concluded and a decision on the pending motions to dismiss is rendered; and

(2) The Thames Band's motion to vacate this court's Order dated July 31, 1983, disqualifying the Indian Law Resource Center from representing the Oneida of the Thames Band is denied; and

(3) Oneida Indian Nation of Wisconsin attorney Arlinda Locklear is directed to turn over to Thames Band's attorneys Braveman and Kelder the remaining mate-

rials heretofore sought by the Thames Band developed under her auspices during the period in which she jointly represented the Oneida Indian Nation of Wisconsin and the Thames Band. Attorneys Braveman and Kelder are directed to not disclose such materials to counsel for the Houdenosaunee, except as necessarily produced in good faith in the course of discovery, until further order of this court.

SO ORDERED.

DATED: June 26, 1984
Syracuse, New York

Neal P. McCurn
U.S. District Judge

APPENDIX B--Decision of the Court of Appeals, Dated March 5, 1985

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 629--August Term, 1984

(Argued: January 28, 1985)
(Decided: March 5, 1985)

Docket No. 84-7642

Oneida of the Thames Band,
Plaintiff-Appellant,

Oneida Indian Nation of Wisconsin,
Plaintiff-Appellee,

The Houdenosaunee, et al.,
Plaintiffs-Intervenors-
Appellees,

v.

State of New York, et al.,
Defendants-Appellees.

Before:

NEWMAN, KEARSE, AND PRATT, Circuit Judges

Appeal from an order of the District Court for the Northern District of New

York (Neal P. McCurn, Judge) granting plaintiff's motion to disqualify counsel for intervenor from also representing a plaintiff.

Remanded. 757 F.2d 19

Robert T. Coulter, Washington, D.C. (Curtis G. Berkey, Indian Law Resource Center, Washington, D.C., Gary Kelder, Daan Braveman, Syracuse University College of Law, Syracuse, N.Y., on the brief), for plaintiff-appellant.

Allan van Gestel, Boston, Mass. (Jeffrey C. Bates, Christopher S. Dalton, Goodwin, Procter & Hoar, Boston, Mass., on the brief), for defendants-appellees Twelve New York Counties and Ryan.

Arlinda Locklear, Washington, D.C. (Richard Dauphinais, Native American Rights Fund, Washington, D.C., Francis Skenandore, Oneida Tribal Law Office, Oneida, Wisc., on the brief), for plaintiff-appellee Oneida Indian Nation of Wisconsin.

(Curtis G. Berkey, Robert T. Coulter, Indian Law Resource Center, Washton, D.C., filed a brief for plaintiff-intervenors, appellees the Houdenosaunee and the Constituent Nations.)

JON O. NEWMAN, Circuit Judge:

Perhaps in an effort to demonstrate a Parkinson's Law of litigation--an old dispute does not fade away, it breeds pretrial appeals--the parties to this suit involving Indian land claims dating back to 1785 and beyond are before our Court for the fourth time in advance of trial. The immediate issue concerns an order of the District Court for the Northern District of New York (Neal P. Mc Curn, Judge) granting the motion of plaintiff Oneida Indian Nation of Wisconsin to disqualify counsel for intervenor the Houdenosaunee, a confederation of Indian nations, from representing plaintiff Oneida of the Thames Band. For reasons that follow, we remand.

The nature of the underlying litigation is set forth in our first encounter

with the lawsuit, Oneida Indian Nation of New York v. New York, 691 F.2d 1070 (2nd Cir. 1982), in which we reversed a judgment dismissing the suit and remanded for further proceedings. The reinstated claims assert rights to five million acres of land in upstate New York that the Wisconsin Oneida and the Thames Band allege were unlawfully conveyed by treaties to New York State in violation of the Articles of Confederation. After remand to the District Court, Judge McCurn entered an order disqualifying Robert T. Coulter, Esq. from acting as counsel for the Thames Band on the ground that the interests of the Thames Band were adverse to those of the Houdenosaunee, whom Coulter also represented. At that point the Houdenosaunee was an applicant for interven-

tion. On the appeal of that ruling, interim counsel for the Thames Band informed us that they planned to seek leave to file an amended complaint and that the new complaint would eliminate the claimed conflict. We therefore remanded the matter to Judge McCurn to consider the proposed amended complaint and, if leave to file was granted, to consider Coulter's joint representation of the Thames Band and the Houdenosaunee in light of the amendment. Oneida Indian Nation of Wisconsin v. New York, 732 F.2d 259 (2nd Cir. 1984). Thereafter, we adjudicated the appeal of the Houdenosaunee from the denial of its motion to intervene and ruled that it was entitled to intervene as of right. Oneida Indian Nation of Wisconsin v. New York, 732 F.2d 261 (2nd Cir. 1984).

Upon remand to the District Court, Judge McCurn granted the motion of the Thames Band to file its amended complaint but adhered to his prior ruling disqualifying Coulter from representing the Thames Band.[1] The District Judge acknowledged that paragraph 5 of the amended complaint added a new allegation that aligned the Thames Band with the Houdenosaunee. In that paragraph the Thames Band asserts "an interest in the subject land which arises under the

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1 The District Court's ruling states that the disqualification order applies to the Indian Law Resource Center, with which Coulter is associated. The appearance that has been filed on behalf of the Thames Band is in the name of Robert T. Coulter, Esq. For purposes of this appeal, our references to Coulter may be taken to include the Indian Law Resource Center and any lawyers associated with the Center.

claim of title of the Houdenosaunee and the Oneida Nation, a constituent nation of the Houdenosaunee." However, Judge McCurn concluded that an adversity of interests remained because of the provisions of paragraph 6, which assert a fall-back position:

> In the alternative, and in the event that it is finally decided that the Houdenosaunee and its member nations have no interest in the subject lands, then the Oneida of the Thames Band claims an interest in the subject lands as a successor in interest to the Oneida Nation and/or Houdenosaunee.

Despite the representations of Coulter that the issue of potentially conflicting interests had been discussed with the Thames Band and the Houdenosaunee and

that each client had expressed a strong preference to have Coulter represent them both, Judge McCurn adhered to his prior ruling disqualifying Coulter from representing the Thames Band, without any explicit consideration of the adequacy or significance of the affected parties' consent.

On this appeal, the Wisconsin Oneida contends initially that we lack appellate jurisdiction in light of the Supreme court's decision in Flanagan v. United States, 104 S. Ct. 1051 (1984), precluding interlocutory review of an order granting a motion to disqualify counsel in a criminal case. However, since Flanagan, we have ruled that orders disqualifying counsel in civil cases remain subject to interlocutory appeal. Interco Systems, Inc. v. Omni

Corporate Services, Inc., 733 F.2d 253 (2nd Cir. 1984) (per curiam).

On the merits of the disqualification ruling, we appreciate Judge Mc Curn's concern that the alternative nature of the Thames Band's amended complaint has the potential for creating an adversity of interests. Though the Thames Band is completely united with the Houdenosaunee in its fundamental claim of an interest "which arises under the claim of title of the Houdenosaunee," the fall-back position of the Thames Band creates the problem. However, there is not presented an inevitable conflict that threatens to pervade the entire course of the trial. The Thames Band has made it clear that it asserts an interest as successor to the Oneida Nation to the Houdenosaunee only in the

event that the primary claim of the Houdenosaunee is rejected.[2] Indeed, the one example given by Judge McCurn to illustrate the risk of adverse interests concerned the circumstances that would arise on appeal if a judgment of the District Court ruled against the Houdenosaunee but in favor of the Thames Band on its alternative claim. Judge

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2 At oral argument, Coulter made it clear that the reference in paragraph 6 of the amended complaint to the primary claim being "finally" decided adversely to the Houdenosaunee does not mean that the Thames Band plans to await a final judgment against the Houdenosaunee before pursuing the alternative claim. Obviously the evidence necessary to support the alternative claim would have to be presented in the current lawsuit. His point is that the legal arguments based on the evidence, which is expected to consist mainly of historical documents, would be presented as primary and fall-back contentions.

McCurn wondered how, at that point, counsel representing both clients could fairly proceed; an appeal on behalf of the Houdenosaunee would risk the favorable judgment obtained for the Thames Band (although even in that event success on such an appeal could simply provide the Thames Band with a substituted basis for prevailing). When confronted with this prospect by Judge McCurn, interim counsel for the Thames Band responded that, if such circumstances arose, the Thames Band could then make a decision either to permit its counsel to pursue an appeal for the Houdenosaunee or to retain new counsel to resist an appeal by the Houdenosaunee.

Whether or not the potential adversity of interests of the Thames Band and the Houdenosaunee is such as to preclude

joint representation under the standards of Disciplinary Rule 5-105(A), we see no reason why the joint representation may not be undertaken with the consent of both clients, as contemplated by DR 5-105(C). That provision permits joint representation, notwithstanding a "situation[] covered by DR 5-105(A)," if "it is obvious that [the lawyer] can adequately represent the interest of each [client] and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each." The Wisconsin Oneida contends that it is not obvious that Coulter may undertake the joint representation in view of the potential adversity of his clients' interests. However, since DR 5-105(A) is

an exception to DR 5-105(A), the adversity that arguably implicates DR 5-105(A) cannot necessarily suffice to preclude the "adequate" representation contemplated by DR 5-105(C). The potential adversity that the joint representation might create in this litigation is not such as would make the day-to-day conduct of the trial unmanageable or even difficult.

On the matter of consent, Coulter represented to the District Court that he discussed the potential adversity of interests with the governing councils of the Thames Band and the Houdenosaunee, that the council of the Thames Band made an informed decision to retain him, and that the council of the Houdenosaunee agreed to the joint representation. Though we have recognized that clients

may give informed consent to joint representation despite actual or potential adverse interests, see In re Taylor, 567 F.2d 1183, 1191 (2d Cir. 1977); Petition of Trinidad Corp., 229 F.2d 423, 430 (2d Cir. 1955), we have required that the court must be satisfied that the client "knowingly and intelligently wishes to proceed with joint representation," In re Taylor, supra, 567 F.2d at 1191. Though we do not doubt Coulter's statement concerning his explanation to the Thames Band and the Band's reaction, the other parties to the litigation are entitled to the assurance of an on-the-record consent sufficient to preclude any subsequent challenge to a judgment by either of Coulter's clients because of his joint representation. Therefore, upon remand, Judge McCurn should ascer-

tain in open court from those authorized to speak on behalf of the Thames Band and the Houdenosaunee that each client understands the potentially adverse nature of the claims and nonetheless prefers to be jointly represented by Coulter. If such informed consent is established on the record, the order disqualifying Coulter from representing the Thames Band should be withdrawn.

In connection with the appeal of the disqualification order, the Thames Band also seeks relief from Judge McCurn's ruling concerning materials gathered by counsel for the Wisconsin Oneida during the time when she also represented the Thames Band. Judge McCurn ruled that these materials are to be turned over to interim counsel for the Thames Band, subject to a restriction that they may not

be shown to counsel for the Houdenosaunee. The dispute over that ruling is sufficiently related to the disqualification order to make it appropriate for us to exercise pendent appellate jurisdiction. The documents in question are not claimed to contain communications covered by the attorney-client privilege. Apparently they are historical documents, which counsel for the Wisconsin Oneida acknowledged at argument of this appeal will become available to the Houdenosaunee during the course of discovery. Her argument is that inspection of the documents by counsel for the Houdenosaunee at this time provides additional time for study beyond what will occur if production is delayed until ordered during discovery. This is the type of tactical sparring no court should counten-

ance. The Thames Band, having received from its former counsel historical materials she gathered while in its employ, should be under no restriction as to their use.

Accordingly, the cause is remanded to the District Court for further proceedings consistent with this opinion. The parties are requested to devote their energies to the cooperative preparation of the litigation so that the merits of the important issues involved may be submitted to the District Court with a minimum of motion practice and an absence of further interlocutory appeals.

APPENDIX C--Decision of the Court of Appeals, Dated April 11, 1985

Docket No. 84-7642

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 11th day of April one thousand nine hundred and eighty-five.

Oneida of the Thames Band,
Plaintiff-Appellant,

Oneida Indian Nation of Wisconsin,
Plaintiff-Appellee,

The Houdenosaunee, et al.,
Plaintiffs-Intervenors-Appellees,

v.

State of New York, et al.,
Defendants-Appellees.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the Plaintiff-Appellee, Oneida Indian Nation of Wisconsin.

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

Elaine B. Goldsmith
Clerk